A

YAZID JAIS & ANOR

v.

LEMBAGA PEMBANGUNAN LANGKAWI & ORS

B

HIGH COURT MALAYA, ALOR STAR
MOHD SOFIAN ABDUL RAZAK JC
[CIVIL SUIT NO: 22-66-2006]
26 MARCH 2007

C ***CIVIL PROCEDURE:*** *Preliminary objection - Disposal of case on point of law - Rules of the High Court 1980, O. 14A - Questions of law for determination - Locus standi - Whether plaintiff had locus standi to initiate proceedings - Whether removal of plaintiff as director and cum managing director of company lawful - Companies Act 1965,* D *s. 128(1),(2) - Whether plaintiff a shareholder to enable him to bring action against company - Whether requirements under O. 14A Rules of the High Court 1980 met*

E The plaintiff filed an application by way of summons in chambers (SIC) encl. 3 for the following reliefs; (i) that the appointment of the third defendant as the managing director of LADA-Eco Tourism Sdn Bhd (the company) by the first and second defendants be declared null and void for want of procedure (ii) that the second and third defendants be restrained by an F injunction from issuing any directives or to make any declaration without prior approval from members of board of directors and (iii) that the third defendant be restrained by an injunction from dealing or interfering with the staff and management of the first defendant. The defendants raised preliminary objection pursuant to G O. 14A Rules of the High Court 1980 for disposal of case on point of law. The question of law for the determination of the court were (i) that the plaintiff had no *locus standi* to initiate the proceeding as he was no longer a member of the Board of Directors of LADA-Eco Tourism Sdn Bhd and no longer had a H vested interest in the company; (ii) that the plaintiff was at all material time a staff and servant with the first defendant and the plaintiff's action in suing the first defendant contravened the rules and regulations of the first defendant; (iii) the appointment of the third defendant was in accordance with the procedure as provided I for in the Companies Act 1965; (iv) the plaintiff's solicitor's firm was on the panel of solicitors for the company which was wholly

owned by the first defendant and the action by the plaintiff's firm of solicitors could cause a conflict of interest in the proceeding and (v) the plaintiff had no cause of action against the defendants.

Held (dismissing encl. 3 with costs):

(1) At the time of filing this action the plaintiff had ceased to be a director and cum managing director of the company by virtue of the fact that the plaintiff's tenure as director cum the managing director had ceased on 28 February 2006. The removal of the plaintiff was lawful and in accordance with a circular which was binding on the plaintiff. Section 128(1) of the Companies Act 1965 states that a director of a public company may be removed before the expiration of his period of office notwithstanding anything in its memorandum or articles or any agreement between a director and the company and s.128(2) of the same Act also provides that a company may by ordinary resolution remove any director before the expiry of his period of office. (paras 17, 21 & 22)

(2) The plaintiff was removed as a director and managing director of the company by the shareholders of the company *ie,* the first defendant who held 100% share and was represented in the company in the capacity as corporate shareholder by the second defendant. The appointment of the third defendant as a director and managing director of the company was in accordance with the Articles of Association of the company by the shareholders' resolution. The plaintiff was also not a shareholder of the company to enable him to bring an action against the company for the alleged irregularity as distinct from an illegality. (paras 25, 26 & 27)

(3) The solicitor acting for the defendants was at liberty to lodge a complaint with the Disciplinary Board of the Bar Council if there was any alleged breach of the Practice & Etiquette Rules. At this juncture, this court was not going to be involved in determining whether or not there was any breach of the rules as it was best to be decided by the Disciplinary Board. Further, s. 29 of the Government Proceedings Act 1956 was not applicable to this case. The proper cause of action was against the company but since the plaintiff was not a shareholder of the company his intended action against the company would not succeed. (paras 35 & 36)

A **(4)** The requirements under O. 14A RHC 1980 had been met. This court accordingly dismissed the writ and statement of claim and encl. 3. (para 37)

Case(s) referred to:

B *Boyce v. Paddington Borough Council [1903] 1 Ch 109* ***(refd)***
Dato' HM Shah & Others v. Dato' Abdullah Ahmad [1991] 1 CLJ 238; [1991] 1 CLJ (Rep) 87 SC ***(refd)***
Edwards v. Halliwell [1950] 2 All ER 1064 ***(refd)***
Foss v. Harbottle [1843] 67 ER 189 ***(refd)***
Tan Sri Hj Osman Saat v. Mohamed Ismail [1982] 2 MLJ 177 ***(refd)***

C **Legislation referred to:**
Companies Act 1965, s. 128(1), (2)
Government Proceeding Ordinance 1956, ss. 3, 29(1)(a)
Legal Profession (Practice & Etiquette) Rules 1976, rr. 3, 4
Rules of the High Court 1980, O. 14A
D Specific Relief Act 1950, s. 54(d), (k)

For the plaintiff - Rosenita Ahmad Osman; M/s Anuar, Nita & Assoc
For the defendants - Abdul Halim Said & Co

Reported by Suhainah Wahiduddin
E

JUDGMENT

Mohd Sofian JC:

F **[1]** On 28 May 2006, the court having read and heard submissions by both solicitors for the plaintiff and the defendants' on an application by the defendants' pursuant to O. 14A Rules of the High Court 1980 dismissed the plaintiff's claim with costs. The plaintiff who is dissatisfied with the said decision has since filed a
G notice of appeal and append herewith are the grounds for the said dismissal.

Parties To The Action

H **[2]** When the writ and statement of claim was filed on 8 March 2006, the 1st and the 2nd above-named were the plaintiffs respectively. However, by letter dated 15 March 2006 the 2nd plaintiff had written to the plaintiff's solicitors informing them that he does not wish to proceed with the writ and statement of claim
I against the defendants and no notice of discontinuance has been filed. For purposes of this proceeding the court will only refer to the plaintiff. Hence the 1st plaintiff remains the only plaintiff in the action against the defendants.

Application

[3] The plaintiff filed an application by way of summons in-chambers (hereinafter called SIC) encl. 3 for the following reliefs namely:

i) That the appointment of the 3rd defendant as the Managing Director by the 1st and 2nd defendants be declared null and void for want of procedure and that the 3rd defendant be directed to vacate the office of the Managing Director until determination by the court.

ii) That the 2nd and 3rd defendants respectively be restrained by an injunction from issuing any directives or to make any declaration without prior approval from the members of the Board of Directors.

iii) That the 3rd defendant is restrained by an injunction from dealing or interfering with the staff and management of the 1st defendant on matters pertaining to the policy, administration and financial matter until the trial disposal of the matter as stipulated in paras (i) and (ii) above by the court.

[4] Grounds For Application

i) That the appointment by the 1st and 2nd defendants of the 3rd defendant as Managing Director of LADA-Eco Tourism Sdn Bhd (hereinafter called the company) a company incorporated under the Companies Act 1965 with emphasis on tourism in Langkawi contravened Article 93 of the Articles of Association of the 1st defendant.

ii) That the appointment of the 3rd defendant as the Managing Director of the 1st defendant is null and void as it contravened Article 93 of the Articles of Association and if not restrained from interfering in the management of the company unless consent by the Board of Directors, will entail management and financial difficulties in the running of the 1st defendant.

iii) That the appointment of the 3rd defendant by the 1st and 2nd defendant does not comply with Service Circular No. 13 Part III of 2000 issued by the Public Service Department (hereinafter called the 'said Circular') whereby it provided guidelines for the appointment on secondment, temporary and permanent transfer.

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Preliminary Objections

[5] The solicitors for the defendants gave Notice of Preliminary Objection dated 2 April 2006 to the plaintiff's solicitor that they are raising preliminary objection pursuant to O. 14A Rules of the
B High Court 1980 for disposal of case on point of law. The requirements of O. 14A are:

a) the question of law or construction is suitable for determination without the full trial of the action.

C b) such determination will be final as to the entire cause or matter or any claim or issue therein; and

c) the parties have had an opportunity of being heard on the question.

D

[6] The question of law for the determination of the court are as follows:

i) That the plaintiff has no *locus standi* to initiate the proceeding as he is no longer a member of the Board of Directors of
E LADA-Eco Tourism Sdn Bhd and no longer has a vested interest in the company.

ii) The plaintiff was at all material time a staff and servant with the 1st defendant and a member of the Board of Company
F which is a wholly owned company of the 1st defendant. The plaintiff action in suing the 1st defendant contravened the rules and regulations of the 1st defendant.

iii) The appointment of the 3rd defendant was in accordance with the procedure as provided for in the Companies Act 1965
G whereby Notice of Meeting was issued on 18 March 2006 and the Extra-Ordinary General Meeting was held on 30 March 2006 and does not contravened the said Circular.

iv) The plaintiff's solicitors firm was at all material time on the
H panel of solicitors for the company which is wholly owned by the 1st defendant. The action by the plaintiff's firm of solicitors could cause a conflict of interest in the proceeding.

v) The plaintiff has no cause of action against the defendants.

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[7] Affidavits Filed

i) The plaintiff affidavit in-support of encl. 3 is affirmed by the plaintiff and marked as encl. 4.

ii) Affidavit in-reply affirmed by the 2nd defendant marked as encl. 12.

iii) Further affidavit by the plaintiff marked as encl. 13.

[8] Written Submissions Filed

i) Defendants solicitors written submission marked as encl. 15.

ii) Reply to plaintiff's submission by the defendants' marked as encl. 18.

iii) Reply to the defendants reply by the plaintiff marked as encl. 19.

[9] Submissions By The Defendants

A. On the issue of locus standi;

i) The defendants submitted that the plaintiff when filing encl. 3 on 12 March 2006 was no longer a Managing Director of the company and also ceased to be a Director of the Company. This is because his tenure of office as the Managing Director of the Company expired on 28 February 2006 that was before the writ and statement of claim was file in court on 8 March 2006.

ii) Immediately after the expiry of his tenure of office on 28 February 2006, the plaintiff had agreed to be reassigned and to assume post of Tourism Manager of LADA w.e.f 1 March 2005 voluntarily (refer to exh. 'C in encl. 12).

iii) That the shareholders resolution issued on 20 March 2006 appointing the new Managing Director of the Company and forthwith terminated the plaintiff as the Managing Director which was later affirmed and rectified w.e.f by an Extra-Ordinary General Meeting (refer to exh. 'M' of encl. 12).

iv) That the Form 49 under the Companies Act were registered with the Companies Commission of Malaysia whereby the plaintiff's name had been removed as a Director of the Company.

v) The defendants solicitors on the issue of *locus standi* refer to the case of *Tan Sri Hj. Osman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 and also case of *Boyce v. Paddington Borough Council* [1903] 1 Ch 109. The defendants solicitors further submitted that the 2 cases cited above requires that the plaintiff has to show sufficient interest to be affected by the actions of the defendants. In this case the defendants failed to show that he has sufficient interest in the proceeding.

B. Conflict of Interest;

i) The plaintiff was at all material time public servant employed by the 1st defendant and seconded to be the Managing Director as well as a Director for a duration of 5 years in accordance with the said Circular whereby it stipulates that maximum duration for secondment shall not exceed 5 years and on the expiry of the secondment period the plaintiff shall return to it's original service with the 1st defendant.

ii) As a public servant employed by the 1st defendant, the plaintiff by filing an action against the 1st defendant has contravened the said Circular.

iii) The subsidiary issue of Conflict of Interest is also raised by the defendants solicitors is the conduct of the plaintiff solicitors who had been previously on the panel of solicitors for the 1st defendant and now acting for the plaintiff against the 1st defendant.

C. No cause of action;

i) That the relief sought by the plaintiff to restrain the 1st defendant tantamount to an injunction against the government which is prohibited under s. 29(1)(a) of the Government Proceeding Ordinance 1956 and also pursuant to s. 54(d) and (k) of the Specific Relief Act 1950.

[10] Submission By The Plaintiff

A. Issue on locus standi;

i) The plaintiff admitted to the fact that as at 1 March 2006 he was no longer the Managing Director of the company and stressed that the action taken is not in his capacity as a Director of the Company. The plaintiff also admitted that he had returned to work with the 1st defendant as the Tourism Manager.

ii) According to the plaintiff the real issue to be determined is whether the plaintiff was still a member of the Board of Directors of the Company at the time when the writ and statement of claim was filed.

iii) Alternatively, whether the plaintiff ceased to be a Director of the Company w.e.f on 1 March 2006 whereas the resolution rectifying the decision of the board was held on 20 and 21 March 2006 respectively and registered with the Companies Commission Malaysia on 20 March 2006.

iv) Whether the removal of the plaintiff as member of the Board of Directors is valid in view of the fact that the notice calling for the EGM was not served on the plaintiff.

v) Whether the removal of the plaintiff as the member of the Board of Directors is valid or contrary thereto the appointment of the 3rd defendant and one (1) Mat Noh bin Ahmad is null and void.

vi) The rectification of the appointment of the 3rd defendant effective 1 March 2006 whereas the resolution rectifying the same was held on 20 March 2006.

vii) Whether the resolution of 20 March 2006 by the 2nd defendant as corporate representative to the 1st defendant could be accepted in view of the fact that it was done in the capacity as a shareholder.

viii) Whether the doctrine of separate legal entity between the company and the 1st defendant which holds 100% share and the company being wholly owned by the 1st defendant could be adopted.

Factual Background

[11] The 1st defendant was at all material time a body corporate established under the Langkawi Development Authority Act 1990 (Act 43) (hereinafter called "Lembaga") whose functions are as follows:

a) To promote, stimulate, facilitate and undertake economic and social development as the Lembaga Pembangunan Langkawi.

b) To promote and stimulate Langkawi as a tourist destination and duty free area.

A c) To promote, stimulate, facilitate and undertake the development of tourism and infrastructure as well as residential, agricultural, industrial and commercial development in Langkawi; and

B d) To co-ordinate the performance in Langkawi, of the activities mentioned in paras (a), (b) and (c).

[12] In order to undertake the functions as spelt out in the Act, a company was incorporated under the Companies Act 1965 under the name of LADA-Eco Tourism Sdn Bhd (hereinafter called the 'company')

[13] The Memorandum of Association listed various objects of the company *inter alia* to promote activities of the tourism industries such as to acquire, manage, operate and or own hotels, motels, clubs, restaurants, resorts, holiday camps, tourist complexes and so forth. The objects listed are not exhaustive.

[14] The said company is wholly owned by the Lembaga. The plaintiff was at all material time an employee of the Lembaga as the Manager in-charge of Tourism and seconded to the company as it's Managing Director, for a period not exceeding five years from the date of secondment w.e.f on 1 September 2000. Accordingly the plaintiff's secondment to the Lembaga expired on 1 September 2005. However, at the request of the plaintiff the period was extended by the company to 28 February 2006.

[15] According to exh. 'B' of the 2nd defendant affidavit in encl. 12 which states as follows:

> Kertas Kerja LPL (K) 03: 2/2005 – Cadangan Pelanjutan Tempoh Pegawai Pinjaman Lembaga Pembangunan Langkawi Kepada Anak Syarikat (LADA-Eco Tourism Sdn Bhd)
>
> 16. Jemaah Pengarah bersetuju dengan cadangan melanjutkan tempoh pegawai pinjaman Pengarah Urusan LADA-Eco Tourism Sdn Bhd, Encik Yazid bin Jais selama 6 bulan lagi mulai 1 September, 2005 hingga 28hb Februari, 2006 dan pencalonan Pengarah Urusan baru adalah Encik Shamsuddin bin Shuib. Lanjutan tempoh bertujuan melicinkan penyerahan tugas dan pertukaran pegawai.
>
> Tindakan: LADA (Bhg.Pentadbiran)

[16] The 2nd defendant was at all material time the Chairman of the Board of Directors of the company and the 3rd defendant was appointed the new Managing Director in place of the plaintiff.

[17] Findings Of Court

On the question of locus standi;

It was an undisputed fact that at the time of filing this action the plaintiff had ceased to be a Director and cum Managing Director of the Company by virtue of the fact that the plaintiff's tenure as Director cum the Managing Director had ceased on 28 February 2006. This period was inclusive of the extension granted as from 1 September 2005.

[18] It is pertinent at this juncture to look at the said Circular which is found in encl. 12 exh. 'D' of which the relevant part is as follows:

> 3.3.1 Tempoh pinjaman yang pertama boleh diluluskan antara 1 hingga 3 tahun. Tempoh keseluruhannya tidak digalakkan melebihi 5 tahun. Untuk memastikan sesuatu pinjaman itu tidak berpanjangan, pegawai hendaklah dikembalikan ke perkhidmatan asal sebaik-baik sahaja tempoh pinjaman yang dibenarkan tamat, atau mereka ditawarkan pertukaran tetap, mengikut mana yang sesuai.

[19] Court also considered exh. 'H' of encl. 12 wherein the 2nd defendant had exhibited the extract of the minutes of meeting of the Board of Director dated 28 February 2006 being the last day on which the secondment to the company shall cease in compliance with the said Circular which is applicable to the plaintiff who was at all material time a servant and employee of the 1st defendant. There is also nothing to show that upon the reassignment of the plaintiff as Tourism Manager of the 1st defendant that he had lost privileges and rights in his reassigned position. On the contrary the plaintiff's privileges and rights under the reassigned position was retained as if the secondment had not taken place.

[20] Conversely if the company intends to further appoint the plaintiff as a Director and also Managing Director, that will be contrary to the said Circular.

[21] The court is of the view that the removal of the plaintiff as a Director and Managing Director of the company is lawful and in accordance with the said Circular which is binding on the plaintiff.

[22] At common law, where director is appointed under the articles for a definite period, there is no inherent power to remove him before the expiration of the period without first altering the articles, even a special resolution to remove him may be held ineffective. This common law position has been modified by the Act at least in relation to a public company. Section 128(1) states that a director of a public company may be removed before the expiration of his period of office notwithstanding anything in its memorandum or articles or any agreement between a director and the company.

[23] Section 128(2) also provides that a company may by ordinary resolution remove any director before the expiry of his period of office.

[24] The court will not interfere with the statutory right of shareholder to remove directors (see the case of *Dato' H.M. Shah & Others v. Dato' Abdullah bin Ahmad* [1991] 1 MLJ 91) whereby the Supreme Court upheld the shareholder's right to terminate the appointment of the executive chairman and managing director of the company in the ninth month of a three year contract with the company appointing him to those positions.

[25] In the case before the court, the plaintiff was removed as a Director and Managing Director of the company by the shareholders of the company ie, the 1st defendant who held 100% share and was represented in the company in the capacity as corporate shareholder by the 2nd defendant. In short the removal was done by the shareholder of the company pursuant to the decision made by the 1st defendant as reflected in exh. 'B' of the 2nd defendant's affidavit. In the ultimate the appointment of the 3rd defendant as a Director and Managing Director of the company was in accordance with the Articles of Association of the company by the shareholders resolution on 20 March 2006.

[26] As between the 1st defendant and the company there is separate legal entity because both are set up under the different legislations. The 1st defendant was established under the Langkawi Development Authority Act 1990 whereas the company was incorporated under the Companies Act 1965.

[27] It was also not disputed that the plaintiff was not a shareholder of the company to enable him to bring an action against the company for the alleged irregularity as distinct from an illegality.

[28] This is known as the rule in *Foss v. Harbottle* [1843] 67 ER 189, where on the second limb it state that;

> an individual shareholder cannot bring an action in the Courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs provided that the irregularity is one which can be cured by a vote of the company in general meeting (per joint judgment of the English Court of Appeal in *Prudential Assurance Co. Ltd v. Newman Industries Ltd (No. 2)* [1982] 1 All ER 354 at p. 357.

[29] Without being a shareholder, it is not possible to bring any actions against the company for alleged illegal or *ultra vires* acts or omissions. This has been settled beyond doubt by the decision in *Edwards v. Halliwell* [1950] 2 All ER 1064 where Jenkins LJ said:

> The case falling within the general ambit of the rule (ie, the rule in *Foss v. Harbottle*) are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complaint of its wholly *ultra vires* the company or association the rule has no obligation because there is no question of no transaction being confirmed by any majority.

[30] The court in *Edwards v. Halliwell (supra)* held that the plaintiff who was seeking a declaration against the company of which he is a shareholder has *locus standi* to bring the action within the above principal.

[31] A collateral issue which was also relevant to *locus standi* is the question of 'nexus' as between the plaintiff and the 1st defendant and *visa-vis* the plaintiff and the company. From the facts herein, it was abundantly clear that the plaintiff was at all material time an employee and servant of the 1st defendant and seconded to the company and appointed as a Director as well as the Managing Director. In so far as the appointment of the plaintiff as the Director in the Company, it was governed by the Article of Association in particular Article 69 regarding the removal of directors whereas the secondment to the company is governed by the said Circular.

[32] The complaint by the plaintiff was the manner in which he was allegedly removed as a Director and Managing Director of the company. That being the case, the plaintiff should have named the company as a defendant but as discussed earlier since the plaintiff is not a shareholder of the company and in accordance with the rule in *Edwards v. Halliwell (supra)* it is not possible to bring any action against the company for alleged illegal, *ultra vires* acts or omissions. The plaintiff's action is doomed to fail.

[33] The court was of the view on this issue alone, it is sufficient to dispose of the case on point of law pursuant to O. 14A RHC 1980. Nevertheless for the sake of completeness the court considers the other issues raised by the defendants in their application.

[34] The two other subsidiary issues are:

i) The conflict of interest with regard to the legal representation of the plaintiff solicitor which could be contrary to r. 3 & 4 of the Legal Profession (Practice & Etiquette) Rules 1976. Prior to the filing of this action against the defendants, the solicitor acting for the plaintiff was at all material time one of the panel solicitors for the 1st defendant. The defendants solicitor alleged that by acting for the plaintiff, its professional conduct is likely to be impugned.

[35] The court was of the view that any alleged breach of the Practice & Etiquette Rules, the solicitor acting for the defendants is at liberty to lodge a complaint with the Disciplinary Board of the Bar Council. At this juncture, the court was not going to be involved in determining whether or not there is any breach of the rules as it is best to be decided by the Disciplinary Board.

ii) The other issue which is also raised by the defendants is pertaining to s. 29 of the Government Proceedings Act 1956. The argument of the defendant is that since the Lembaga is set up under statue and that makes the 1st defendant a government department and no injunction proceeding can be taken against the 1st defendant. The plaintiff in rebuttal submitted that under the said Act establishing the 1st defendant s. 3 thereof clearly states that it can be sued or sue in its own name.

[36] The court was in agreement with the views expressed by the plaintiff and held that s. 29 of the Government Proceedings Act 1956 was not applicable to the case before the court. Be that as it may, the court again reiterated that the proper cause of action was against the company but since the plaintiff is not a shareholder of the company his intended action against the company would not succeed.

Decision Of The Court

[37] Based on the reasons adumbrated above, the court was satisfied that the requirements under O. 14A RHC 1980 has been met and accordingly dismissed the writ and statement of claim and encl. 3 with costs.